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No. 73-315

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

BONN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

No opinion was rendered by either the district court or the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1973. The petition for a writ of certiorari was filed on August 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence in petitioner's 1972 trial for bribery of his 1968 indictment and conviction for bribery constituted prejudicial error.

2. Whether the prior acquittal of an alleged co-conspirator on the later jury bribery charges was properly excluded from evidence.

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on three counts of obstruction of justice and bribery of a public official (a juror) in violation of 18 U.S.C. 2, 201(b), 371, and 1503. He was sentenced to five years' imprisonment on each of the three counts, the terms to run concurrently. He was fined $5,000 on each of the first two counts. The court of appeals summarily affirmed (Pet. App. A).

A. *The 1968 Government Contract Bribery Case and its Aftermath*

In 1968, petitioner, together with former governor of West Virginia W. Wallace Barron, Burl Sawyers, Vincent Johnkoski, Alfred Schroath, and Truman Gore, was indicted in the Southern District of West Virginia for conspiracy to violate 18 U.S.C. 371 and 1952. Petitioner was charged with having used interstate facilities to commit bribery involving kickbacks in the award of contracts with the State of West Virginia, in violation of the West Virginia bribery statutes, specifically West Virginia Code, c. 61, Art. 5, Sections 4 and 5 (Tr. 8).[1] After a jury trial, petitioner and three defendants were found guilty as charged. Ex-Governor Barron was acquitted (Tr. 339). Petitioner was sentenced to a four-year term of imprisonment and fined $10,000. The court of appeals affirmed. *United States* v. *Sawyers,* 423 F. 2d 1335 (C.A. 4).

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[1] "Tr." designates the transcript of the 1972 trial, a copy of which is being lodged with the Clerk of this Court. The closing arguments are bound and paginated separately, and are therefore cited as "C.A."

On February 20, 1971, an indictment was returned in the Southern District of West Virginia charging ex-Governor Barron, his wife Opal Barron, and Ralph Buckalew, the jury foreman in the 1968 trial, with bribery of a juror during the course of the 1968 trial. By superseding indictment petitioner and one Robert Perry were also named in this charge. As a result of that indictment, petitioner and other defendants requested the court of appeals to remand the 1968 case to the district court again for consideration of motions based upon the allegations of jury tampering[2]. On March 19, 1971, the court of appeals again remanded the case to the district court. Petitioner and the other defendants then filed motions to vacate their convictions, or in the alternative for a new trial. On August 30, 1973, subsequent to the court of appeals' decision in the 1971 jury bribery case involved here (Pet. App. A), the district court heard the defendants' motions but, on the suggestion of petitioner's counsel, has deferred ruling on petitioner's motion pending the Court's action on the present petition for a writ of certiorari.[3]

B. *Trial of the Jury Bribery Case*

The trial of petitioner for bribery of jury foreman Ralph Buckalew during the 1968 trial took place in September

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[2]The court of appeals had previously remanded the case to the district court for possible further proceedings based on the outcome of a then-pending state court challenge to the constitutionality of the state bribery statute. Motions for a new trial were denied after the state supreme court upheld the constitutionality of the bribery statutes, *State ex rel. Carson* v. *Wood,* 175 S.E. 2d 482 (W. Va.); *State ex rel. Gillespie* v. *Wood,* 175 S.E. 2d 497 (W. Va.), and petitioner and other defendants again appealed.

[3]Although no orders have yet been entered, the district judge has said he will grant new trials to two other defendants.

1972.[4] Ex-Governor Barron testified that he had arranged with his attorney, Robert Perry, a codefendant who had previously been acquitted on this charge, to have a $25,000 bribe given to juror Buckalew in return for a verdict of acquittal, or at the very least a hung jury, in the 1968 case (Tr. 100-107). Barron was able to raise $15,000 through Perry (Tr. 107-108). He raised the balance through the Citizens National Bank in Weirton, West Virginia, on August 22, 1968, through a loan that was not to be reflected on the books of that bank (Tr. 108).

Barron stated that on August 26, 1968, he first had a discussion with petitioner concerning the jury bribe (Tr. 116-118). At that time, Barron testified, petitioner told Barron that he knew "Buckalew had been reached and that he wanted to be a part of that transaction and he was willing to put $10,000 into that transaction" (Tr. 118, 200). Petitioner advised Barron that his source for the $10,000 was one Julius George, who had a cashier's check for $10,000, and that

> Mr. Julius George could get this cashier's check cashed and nobody would be able to find out about it, and he would give this money to Mr. Brown who, in turn, would put it in and make it a part of the twenty-five thousand [Tr.118].

Barron and petitioner also discussed whether or not the payment of the $25,000 bribe would result in an acquittal or a hung jury (Tr. 119). At that time Barron told petitioner that the most they could expect would be a hung jury (Tr. 119).

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[4]On February 20, 1971, the day the first indictment was returned, Buckalew pleaded guilty and was immediately sentenced to terms of imprisonment for five and twelve years, the terms to run concurrently. On March 29, 1971, W. Wallace Barron pleaded guilty to the charges made against him for jury bribery; he was subsequently sentenced to a term of imprisonment for twelve years and a fine of $50,000.

On August 27, 1968, Julius George testified that he borrowed $9,960, by cashier's check, from the National Bank of Commerce in Charleston, West Virginia (Tr. 48-49, 60-61). After the check was cashed, the money was wrapped in groups of $1,000 and bound with paper straps containing a National Bank of Commerce stamp, the bank where the check had been negotiated (Tr. 52).

George testified that this loan was made at the request of petitioner, who wanted George to loan him "[s]omewhere in the neighborhood of $10,000" (Tr. 58-59). George, who was the manager of the Daniel Boone Hotel in Charleston, West Virginia, further stated that petitioner said he needed the money to pay his hotel bill at the Daniel Boone, where he stayed during the 1968 trial, for attorney's fees, and for "[g]eneral expenses that he was incurring during this time that he was spending—that he was spending in Charleston" (Tr. 58-59). George stated that, although he could not recall the exact amount of his loan to petitioner, it was between $9,000 and $10,000 (Tr. 60; see also Tr. 667). While he could not remember the exact day of delivery of the money to petitioner, George stated that it could have been given to him the same day it was borrowed from the bank (Tr. 61-62).

On the evening of August 27, 1968, Barron testified, Perry delivered $25,000 in cash to Barron (Tr. 119-120). The money was subsequently delivered to the jury foreman (Tr. 121-122, 223). Upon receiving the cash from Perry, Barron noticed that part of it was wrapped with paper wrappers and part with rubber bands (Tr. 120). Barron stated that approximately $9,000 or $10,000 was wrapped "like if you went to the bank to get a big check cashed and they would give you the cash. It had the wrappers of the bank around the money" (Tr. 120). These wrappers had "National Bank of Commerce, Charleston, West Virginia" on them ard were stamped August 27, 1968 (Tr. 120-121).

Barron testified that he talked with attorney Perry on the morning of August 27, 1968, concerning petitioner's knowledge of the bribery scheme (Tr. 122). Barron stated that Perry told him that petitioner had also contacted Perry (Tr. 122). According to Barron, Perry then advised Barron

> that it was all right with him to have him [petitioner] in on the transaction. As a matter of fact, it was better to have him on the transaction, since he was aware of the fact that Mr. Buckalew had been reached [Tr. 122].

On the morning of August 28, 1968, petitioner was told by Barron that the money had been delivered to juror Buckalew as planned (Tr. 124). Buckalew testified, however, he was never told that he was to work for the acquittal of anyone other than Barron (Tr. 238, 249, 261-262).

At the close of the 1968 bribery trial petitioner and three defendants were found guilty by the jury; Barron was acquitted. Previous to Barron's acquittal the jury vote was 11-1 for conviction with Buckalew as the lone holdout (Tr. 348-349).

Petitioner testified on his own behalf that Barron's testimony involving him in the bribery was a fabrication (Tr. 697-699). Petitioner claimed he used the cash received from Julius George in a legitimate manner (Tr. 665-671). Among his witnesses was Robert Perry, who testified that he had not participated in a bribery scheme, and that he had no knowledge of any involvement therein by petitioner (Tr. 644-647).

ARGUMENT

1. Petitioner contends that his indictment and conviction in the 1968 bribery case were improperly admitted into

evidence at his 1972 trial for the purpose of impeaching his credibility (Pet. 11-15). This contention is without merit. The subject of petitioner's conviction in the prior case was first mentioned by petitioner's counsel during his cross-examination of ex-Governor Barron, during which the following exchange occurred (Tr. 201):

> Q. And then it is your testimony, is it not, sir, that money was passed and you were acquitted, correct?
>
> A. Yes, sir.
>
> Q. And Mr. Brown was found guilty on the one count in the indictment, was he not?
>
> A. That is true.

At the beginning of the trial the government told the judge that it wanted to offer the 1968 indictment and conviction of petitioner into evidence as proof of a prior similar act (Tr. 4-15). The judge, however, refused to admit them into evidence at that time. The judge had not finally ruled on the admissibility of the 1968 indictment and conviction when petitioner's counsel introduced the subject of the conviction. Thereafter the government was allowed to read portions of the 1968 indictment to the jury (Tr. 447-448).

Even if petitioner had not introduced the subject himself, it was proper to impeach his credibility through use of the past conviction and indictment, the latter being the best evidence of the exact offense for which petitioner had been convicted. Once petitioner took the stand, the admission of this evidence was proper, *e.g.*, *United States* v. *Escobedo*, 430 F. 2d 14, 18-19 (C.A. 7), certiorari denied, 402 U.S. 951, and any error in its earlier admission would have been harmless. Petitioner's claim of error gains no support from the cited District of Columbia cases, ac-

knowledged by petitioner to depart from the weight of authority (Pet. 14) and involving a statute peculiar to that jurisdiction. See *Fenwick* v. *United States*, 252 F. 2d 124, 126, n. 3 (C.A.D.C.) (2-to-1), and *Campbell* v. *United States*, 176 F. 2d 45, 47-48 (C.A.D.C.). In both cases the defendant's conviction was on appeal and had never been affirmed. Here petitioner's conviction had already been appealed and affirmed, *United States* v. *Sawyers, supra*, and was being attacked only in the district court on a second set of post-trial motions.[5]

2. Petitioner contends that the 1968 indictment and conviction were improperly admitted as evidence of a prior similar act (Pet. 9-11). After petitioner's counsel had cross-examined ex-Governor Barron with respect to his 1968 acquittal and petitioner's conviction for taking a bribe (Tr. 201), the trial judge ruled that he would allow in evidence of the prior crime, as the government had requested, for "the purpose of showing knowledge, intent, and motive" (Tr. 295-296). At that time the government submitted an instruction to the judge on the subject of the effect of a similar act (Tr. 301). It is well established that evidence of prior similar acts is properly admissible to demonstrate, *inter alia*, scheme, design, or intent, *United States* v. *Pauldino*, 443 F. 2d 1108, 1113 (C.A. 10), certiorari denied *sub nom. Bridwell* v. *United States*, 404 U.S. 882.

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[5]Rule 609(e) of the Proposed Rules of Evidence for United States Courts and Magistrates states:

> Pendency of Appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Although Congress is analyzing the proposed rules before permitting them to go into effect, Rule 609(e) is retained in its entirety in a draft prepared by the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives. 119 Cong. Rec. H5457 (daily ed. June 26, 1973)

The indictment was introduced into evidence and read to the jury at the close of the government's case (Tr. 446-448). At that time the judge carefully gave the following limiting instruction to the jury:

> I want you to know that that [sic] evidence of that prior conviction cannot be considered by you as substantive evidence that Mr. Brown is guilty of the charge for which he is being tried in this court today, was tried yesterday, and perhaps tomorrow and the next day, whatever we have.
>
> Evidence of a prior conviction may be considered by you on the issue of a defendant's knowledge, intent and motive with regard to the particular offense with which he is now charged in this case, but evidence of an act done at one time is not any evidence or proof whatever that a similar act was done at another time or on some other occasion. Stated otherwise, evidence that this defendant may have been involved in a conspiracy charge touching the crime of bribery in the 1968 trial may not be considered by you in determining whether the defendant, Mr. Brown, committed the crime of conspiring to bribe the juror Buckalew [Tr. 449-450].

Similar cautionary instructions were given by the judge in his final charge to the jury (Tr. 876-878). Once the conviction was put in evidence by petitioner himself, it remained for the trial judge to determine what, if any, limitations were to be placed on the jury's consideration of the evidence. In these circumstances, the use of the 1968 indictment and conviction was proper.

3. Petitioner contends that it was reversible error for the trial court to refuse to admit into evidence the acquittal of Robert Perry on the jury bribery charges (Pet. 15-17). This contention is without substance since Perry's acquittal had nothing to do with petitioner's guilt or inno-

cence (Tr. 18-19, 312-313); see *Burt* v. *United States*, 139 F. 2d 73, 76 (C.A. 5), certiorari denied, 321 U.S. 799.

In *Commonwealth* v. *Quaranta*, 295 Pa. 264, 145 A. 89, 91-92, cited by petitioner (Pet. 16), the defendant attempted to show that two men jointly indicted with him had been tried for the crime and acquitted. The Pennsylvania Supreme Court upheld the refusal of the trial court to admit the acquittals into evidence, stating that such evidence was not admissible on behalf of defendant as evidence tending to establish his innocence.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] The claim that the government's argument to the jury implied that Perry was "facing prosecution" (Pet. 17) is without support in the record. We note first that Perry had already been acquitted of charges in March 1972. In the closing argument the government stated as follows:

> I hardly expect Mr. Perry would come in here and readily admit to you that he bribed a juror in his capacity as attorney for Governor Barron in the 1968 case. I don't think that's going to be the thing he is going to do.
>
> So I think you can bear in mind—you can take his testimony and weigh it in light of his situation as regards to this entire circumstances [C.A. 64].

Petitioner did not object to these remarks at the time they were made nor seek to have them stricken. Moreover, taken in context, the remarks refer to Perry's status as attorney, and contain no implication that Perry was facing prosecution.